

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

INCYTE CORPORATION,)	
)	
Plaintiff,)	C.A. No. N15C-09-055 MMJ CCLD
)	
v.)	TRIAL BY JURY OF TWELVE
)	DEMANDED
FLEXUS BIOSCIENCES, INC.,)	
TERRY ROSEN, and JUAN JAEN,)	FILED UNDER SEAL
)	
Defendants.)	

Submitted: August 1, 2018

Decided: August 23, 2018

OPINION

Stephen L. Ascher, Esq. (argued), Jeremy H. Ershow, Esq., Jenner & Block LLP, David A. Schlier, Esq. (argued), Michael P. Kelly, Esq. (argued), Andrew S. Dupre, Esq., J. Wylie Donald, Esq., McCarter & English, LLP, Attorneys for Plaintiff Incyte Corporation.

Jonathan A. Patchen, Esq. (argued), Max B. Twine, Esq., Taylor & Patchen, LLP, Attorneys for Defendants Terry Rosen and Juan Jaen, James F. Hurst, Esq. (argued), Patricia A. Carson, Esq. (argued), Daniel Forchheimer, Kirkland & Ellis LLP, Attorneys for Defendant Flexus Biosciences, Inc., Gregory V. Varallo, Esq., C. Malcolm Cochran, IV, Esq., Travis S. Hunter, Esq., Katharine L. Mowery, Esq., Richards, Layton & Finger, P.A., Attorneys for Defendants.

JOHNSTON, J.

This is a trade secrets case. Defendants are Flexus Biosciences, Inc. and the two doctors, Terry Rosen and Juan Jaen, that founded Flexus. Plaintiff Incyte has alleged that Flexus was able to develop an IDO-1 inhibitor—a compound for cancer treatment—because of trade secrets misappropriated from Incyte. Incyte alleges that

the development of the inhibitor led to Flexus's \$1.25 billion merger with Bristol Myers Squibb ("BMS").

Incyte's original complaint contained claims for misappropriation of trade secrets, tortious interference with contract, unjust enrichment, conspiracy, and aiding and abetting. This Court dismissed the tortious interference with contract and aiding and abetting claims because of a lack of subject matter jurisdiction.¹ The Court later granted Incyte leave to amend the complaint to add a claim for trade libel.²

In sum, three Incyte claims remain pending in this case: misappropriation of trade secrets, trade libel, and conspiracy to commit trade libel.

Incyte alleges that four pieces of information constitute misappropriated trade secrets: (1) the half-life of its confidential IDO compound, (2) the knowledge of the "clinical success" of Incyte's IDO-inhibitor, and the knowledge that two tests, (3) a T-cell proliferation assay (TCPA), and (4) a whole human blood assay (HWBA), would accelerate the development of an IDO-inhibitor.

Incyte alleges that the source of the leak of three of the four trade secrets—the "clinical success," the TCPA, and the HWBA—was Dr. Jordan Fridman, a non-party to this case and a former Incyte employee and early Flexus employee.

¹ *Incyte Corp. v. Flexus Biosciences, Inc.*, 2016 WL 1735485, at *10 (Del. Super.).

² *Incyte Corp. v. Flexus Biosciences, Inc.*, 2017 WL 7803923, at *7 (Del. Super.).

Incyte claims Defendants misappropriated the fourth alleged trade secret, the half-life data, from two sources. First, they claim Defendants misappropriated a confidential Investigator's Brochure, which one defendant cited in a document (the "White Paper") sent to potential investors. Second, Incyte claims the half-life data was also provided by Dr. Holbrook Kohrt, a clinical investigator who had access to confidential Incyte data while he was employed by Flexus. They allege Kohrt sent the half-life data in an email to one of the defendants (the "Clinical Protocol Excerpt" or "CP Excerpt"). All of the allegations related to Kohrt are newly before the Court and are the sole basis of Incyte's second motion to amend the complaint.

The basis of the trade libel claim is a portion of a Flexus presentation to BMS. Defendants presented incorrect data related to a confidential Incyte compound. Incyte claims this misrepresentation led to an improper advancement of Flexus and a loss of opportunity for Incyte. It maintains Defendants acted in a conspiracy in furtherance of this trade libel.

Before the Court are five motions related to these claims.

Incyte has filed two of the five motions: a second motion to amend the complaint and a motion for partial summary judgment, both concerning the new Kohrt allegations.

Defendants have filed three motions for summary judgment. One was filed by Flexus and a second was filed jointly by defendants Drs. Rosen and Jaen.

Flexus's motion requests dismissal of Incyte's trade secret misappropriation claim, while the Drs.' motion primarily addresses Incyte's trade libel and conspiracy claims and also argues the Drs. are not liable with regard to the trade secret claim. All Defendants joined in a third motion for summary judgment. This third motion is a cross-motion filed in response to Incyte's motion for partial summary judgment.

SUMMARY JUDGMENT AND MOTION TO AMEND STANDARDS

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.³ All facts are viewed in a light most favorable to the non-moving party.⁴ Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.⁵ When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.⁶ If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.⁷

Like its first motion to amend its complaint, Incyte's second motion to amend

³ Super. Ct. Civ. R. 56(c).

⁴ *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).

⁵ Super. Ct. Civ. R. 56(c).

⁶ *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

must overcome two obstacles. First, because this Court issued a case management order that stated “[n]o amendment to the pleadings shall be permitted, except upon leave of Court on a showing of good cause,”⁸ Incyte must show good cause for the Court to permit the amendment. “[G]ood cause’ is likely to be found when the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party.”⁹

Second, the amendment must be permitted under Rule 15. Under that rule, “[a] party may amend its pleading after a responsive pleading is served by leave of the Court.”¹⁰ “[L]eave shall be freely given when justice so requires,” but “should be denied when the proposed amendment would be futile.”¹¹ “A motion for leave to amend a complaint is futile where the amended complaint would be subject to dismissal under Rule 12(b)(6) for failure to state a claim.”¹² “Motions to amend are normally granted by the Court unless there is serious prejudice to the opposing party.”¹³

⁸ *Incyte Corp. v. Flexus Biosciences, Inc.*, Del. Super., C.A. No. N15C-09-055, Johnston, J. (Nov. 17, 2016) (ORDER).

⁹ *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1107 (Del. 2006) (citation omitted).

¹⁰ Super. Ct. Civ. R. 15(a).

¹¹ *Id.*; *Clark v. State Farm Mutual Automobile Ins. Co.*, 131 A.3d 806, 811 (Del. 2016).

¹² *Clark*, 131 A.3d at 811–812.

¹³ *Harrison v. Hodgson Vocational Technical High School*, 2007 WL 3112479, at *1 (Del. Super.).

ANALYSIS

Incyte's Second Motion to Amend the Complaint

Incyte's original complaint alleged that various trade secrets were transmitted to Flexus by Dr. Jordan Fridman, a non-party to this case and a former Incyte employee. Incyte seeks to amend the complaint to add facts relating to a different non-party doctor, Holbrook Kohrt, who Incyte alleges also provided Flexus with trade secrets. Kohrt, now deceased, allegedly continued to participate in a research network of clinical investigators called the Cancer Immunotherapy Trials Network ("CITN") while he was an early Flexus employee. Incyte alleges that Kohrt did not disclose his employment with Flexus to the CITN, allowing him access to on-going clinical trials, which contained confidential information he forwarded to Flexus. Specifically, Incyte alleges Kohrt sent Dr. Jaen of Flexus an excerpt from a Clinical Protocol ("CP Excerpt") from one of Incyte's clinical trials that contained confidential information.

Incyte argues that the Court should grant its motion because it is only asking to amend the pleadings to conform to evidence revealed during discovery. Though the amended facts bring in a new source of misappropriation, they do not, according to Incyte, alter the nature of the claim it already has brought against Defendants.

Defendants claim to have produced the email Kohrt sent containing the CP Excerpt on January 21, 2017, early enough for Incyte to have included the allegations

in its August 25, 2017 first motion to amend. Moreover, Defendants state that Incyte became aware of the significance of the document on October 3, 2017 at the very latest, when Flexus's counsel explained in a hearing with the Special Master on a motion to compel the exact nature of the Kohrt email—that its text was a CP Excerpt. Nevertheless, Incyte did not bring the motion to amend until January 26, 2018, when the fact discovery cutoff date was January 29, 2017. Defendants also argue that allowing the amendment would cause them to suffer prejudice. Defendants specifically claim that if the motion were granted, they would need to take discovery regarding the nature of Kohrt's relationship with CITN and Incyte and the efforts taken to maintain confidential information arising from those relationships.

In defense of its delay, Incyte notes that though the email was in its possession for some time, it has a generic subject line and contains no indication of source. Incyte claims there was no actual evidence that the email was a CP Excerpt until Jaen testified to that effect on January 15, 2018. Incyte further argues that Defendants would suffer no prejudice because Defendants have been aware of the nature of the excerpt since at least the October 23, 2017 hearing. It also claims Defendants already have taken discovery on the topic.

The Court finds that Incyte has demonstrated good cause for the amendment and that granting it would not cause Defendants to suffer undue prejudice. The proposed amendment essentially conforms the pleadings to evidence found in

discovery. “It is particularly appropriate to amend pleadings so that they will conform to the evidence developed during discovery or at trial.”¹⁴ The complexity and breadth of this litigation, along with the innocuous initial appearance of the piece of evidence at issue, adequately explain why the significance of the email was not immediately apparent. The amendment is not so untimely as to seriously disrupt the planned timeline of the case. The Court remains hopeful that this decision will not delay trial.

Motions for Summary Judgment

Misappropriation of Trade Secrets

A trade secret is defined by Delaware’s Uniform Trade Secret Act as “information, including a formula, pattern, compilation, program, device, method, technique or process, that . . . [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”¹⁵ Misappropriation of a trade secret exists when there is “[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.”¹⁶

¹⁴ *Beattie v. Beattie*, 786 A.2d 549, 558 (Del. Super. 2001).

¹⁵ 6 Del. C. § 2001.

¹⁶ *Id.*

The Delaware Supreme Court recently has noted that to survive a motion for summary judgment, a misappropriation claim must be supported by specific evidence.¹⁷ While a “rational inference”¹⁸ may be made regarding misuse, such an inference may not be based “solely on speculation and conjecture.”¹⁹ Circumstantial evidence that the defendant had the “motive and opportunity” to misappropriate a secret—simply that it “could have” done it—or that the defendant’s subsequent product was “similar” to the plaintiff’s “is insufficient to give rise to an inference of misappropriation.”²⁰ At the summary judgment stage, “[i]t is no longer time for just smoke. There has to be some fire.”²¹

The Court will examine whether Incyte’s efforts to maintain confidentiality as a whole were sufficient before examining each trade secret in turn.

Reasonable Efforts

Defendants note that Fridman’s employment contract with Incyte did not include a covenant not to compete, that Incyte allowed Fridman to stay on for months at Incyte after he announced he would be taking a new job, and failed to remove Fridman from its IT network for a week after he left, at which time he continued to receive Incyte emails and had to ask to be removed from the system. After

¹⁷ *Elenza, Inc. v. Alcon Laboratories Holding Corp.*, 183 A.3d 717, 725 (Del. 2018).

¹⁸ *Id.* at 723.

¹⁹ *Id.* at 726.

²⁰ *Id.* at 725 (citing *Savor, Inc. v. FMR Corp.*, 2004 WL 1965869 (Del. Super.)).

²¹ *Id.* at 723.

Fridman's departure and after Incyte learned Fridman was working for a competitor on an IDO-inhibitor, Incyte did not seek assurances that confidential information would not be shared. Incyte only performed an internal investigation into Fridman's conduct after learning of the BMS merger.

In response, Incyte points to numerous measures it took to protect its trade secrets. It required every incoming employee to sign a confidentiality agreement, distributed an employee handbook with a section on disclosure of company information, held employee trainings regarding confidentiality, and held an exit interview in which the employee agreed to sign a certification of adherence to the confidentiality obligations. Incyte also points out that it was a California company when it hired Fridman and non-compete agreements are unenforceable in that state.

Viewing the facts in the light most favorable to Incyte, there is at least a genuine issue of material fact as to whether it took reasonable precautions to protect its trade secrets. Though Flexus has produced evidence suggesting it was possible for Incyte to take greater measures to maintain confidentiality, it remains a question of fact for the jury as to whether the efforts Incyte did take were "reasonable under the circumstances."

"Clinical Success"

The alleged "Clinical Success" trade secret concerns the supposedly improper disclosure of the promising results of a study on the efficacy of Incyte's IDO

compound. Incyte alleged that the disclosure of the study's positive results drove Flexus to pursue production of the same compound.

In addition to arguing that the clinical success had no economic value, Flexus argues this information was not confidential. Fridman's comments on the supposed clinical success of the compound came after Incyte publicly disclosed the same facts to investors. Incyte argues that this disclosure was inconsequential, because "the value of Fridman's comments was his personal corroboration of that information's import, as well as his personal testimonial of how his own opinion on IDO had evolved."²²

Incyte's argument implicitly concedes the "clinical success" information was no longer a trade secret. There is no genuine issue of material fact as to the publication of this information. No matter its value or source, Fridman's opinion on public information is not an actionable trade secret. The Court need not reach the parties' arguments as to the whether there was evidence of misappropriation.

T-Cell Proliferation Assay (TCPA)

An IDO inhibitor allows T-cells to proliferate. Performing a TCPA is a way to examine the effects of an IDO inhibitor. Incyte has alleged that Fridman disclosed the importance of TCPAs to Flexus, specifically that they could be used as "a gating criterion" and to resolve disconnects between other assays, which was valuable to

²² Incyte Br. 34.

avoid development delays.²³

Flexus argues that the value of TCPAs is not a trade secret as it has long been generally known to the public—Incyte itself published patents disclosing TCPA use in its IDO program.²⁴ It further notes that there is no evidence of a specific communication demonstrating misappropriation.

Incyte responds by stating that using a TCPA specifically as a “gating criterion” is a trade secret. “Gating means it’s a go/no-go kind of a decision based on the data you generate with that particular assay.”²⁵ Incyte also states that this specific use did not begin at Flexus until Fridman suggested it.

This alleged use of the TCPA was not sufficiently confidential to constitute a trade secret. It is undisputed that performing a TCPA to test an IDO is widely practiced. Incyte does not seek prevention of a proprietary, specific method of performing a TCPA, only the knowledge that performing this test at an early stage is valuable. The Court finds that this is not protectable as a trade secret, because it is “generally known” or at least “readily ascertainable” due to TCPA’s widespread use in IDO testing. The Court need not reach the parties’ arguments as to whether there is evidence that the TCPA was misappropriated.

²³ Incyte Opening Br. 29.

²⁴ Flexus Opening Br. 26.

²⁵ Incyte Answering Br. Ex. 62 at 194.

Human Whole Blood Assay (HWBA)

Performing an HWBA is another means of testing an IDO inhibitor's efficacy. Incyte alleges that Flexus specifically misappropriated the 100 ng/ml concentration Incyte used to perform the test, along with knowledge about whether characteristics and differences between human donors affected test results.

Flexus argues that Incyte can only allege Flexus had access to this information, not that it appropriated it. It points to an email establishing that Dr. Walters, not Fridman, suggested that Flexus perform a HWBA, that Walters took the lead on the project, that those working on the project reported to Walters and not Fridman, and to testimony from Walters that he had no discussions with Fridman about it. Most significantly, Flexus also argues that HWBA is not a trade secret, arguing that using a 100 ng/ml concentration in HWBA had previously been published.

In response, Incyte points to three pieces of circumstantial evidence: Flexus established its HWBA in 11 days, when it took Incyte 6–8 months; Flexus's HWBA concentration matched Incyte's; and Walters originally ordered tests with different concentrations before electing to use only the concentration by Incyte.²⁶

Circumstantial evidence appears to exist suggesting a misappropriation of using 100 ng/ml concentration in HWBA. Use of HWBA in this context existed in

²⁶ Incyte Br. 28.

the literature prior to Flexus's alleged misappropriation. However, it is a genuine issue of material fact whether the specific concentration used by Incyte was likewise previously published.²⁷ Incyte has established a *prima facie* case that Fridman directed the HWBA testing in accordance with the way it was performed at Incyte. The jury must determine whether that information was protected as a trade secret.

Confidentiality of the Half-Life Data

The half-life of a drug is the time it takes for an amount of a drug in a person's system to decrease by half. It is useful for determining an appropriate dose. Incyte alleges Flexus misappropriated the half-life of its molecule and used it in multiple presentations.

Flexus argues that Incyte disclosed the projected half-life of its molecule several times, making this a non-trade secret. Additionally, Flexus urges the Court to draw a distinction between the value of knowing the half-life to Incyte, which it does not deny, and the value to competitors of learning it, which it argues is non-existent. Flexus asserts that knowing the half-life would only be important to a competitor so that they would know how many daily doses the drug would need. Here, Incyte made no secret that its drug would require twice-daily dosing.

Incyte argues that the *actual*—not projected—half-life of its molecule

²⁷ See, e.g., Aff. of Ryan P. Durkin in Support of Defendants' Reply Briefs in Support of Their Motions for Summary Judgment Ex. 33 at Fig. 6.

remained confidential and a protected trade secret. The projections, which were not secret, placed the half-life at 4 to 7 hours, but the actual half-life was between 2.4 and 3.9 hours.²⁸ Incyte argues that Flexus used the confidential, actual data to differentiate its forthcoming drug from Incyte's.

The Court finds that there is a genuine issue of material fact as to whether the actual, non-projected half-life data—which indisputably remained confidential—was of independent economic value. A jury must determine the value, if any, of knowing the half-life was 2.4 to 3.9 hours rather than 4 to 7 hours. Neither party is entitled to summary judgment on this issue.

That this alleged trade secret remained confidential is not the end of the inquiry. Defendants also argue that there is no evidence of knowledge of misappropriation or recklessness on their part.

Incyte alleges that Flexus gained possession of a confidential brochure, which one of its founders, Dr. Jaen, cited in a White Paper in reference to the half-life of Incyte's molecule. Despite this citation, Flexus argues that Jaen never had the brochure—the source of the information was actually an excerpt of a different paper and the citation was incorrect. Incyte argues that the Court can reasonably infer that Flexus had possession of the brochure not only because of the citation, but also because a specific phrase in the White Paper was present in the brochure, but not the

²⁸ Incyte Answering Br. Ex. 58 at 4.

other alleged source.²⁹

The Court finds that although the physical brochure was not found in Flexus's possession, the circumstantial evidence is strong enough to at least create a genuine issue of material fact as to whether Defendants possessed it and acquired it with knowledge or a reason to have knowledge "that the trade secret was acquired by improper means."³⁰

Both sides also argue that each is entitled to summary judgment on the issue of misappropriation of the half-life data with the Kohrt email as the source. The Court finds neither is entitled to it. The jury must resolve the genuine issue of material fact of whether Jaen knew or should have known that Kohrt had sent him confidential information from a clinical trial in the email at issue.

Unjust Enrichment

Flexus argues that even if the above described trade secret misappropriation occurred, it was not enriched by any of it, because the proceeds of the merger with BMS went to Flexus's shareholders, not to Flexus. Incyte, meanwhile, has produced expert testimony as to the extent the acquisition of a trade secret in this case may have accelerated Flexus's marketability.

There is at least a genuine issue of material fact as to whether the alleged trade

²⁹ Incyte Answering Br. 31.

³⁰ 6 Del. C. § 2001.

secret misappropriation contributed to the BMS merger. Incyte's expert testimony creates a question for the jury as to whether the alleged trade secrets helped Defendants in "ways that might seem small individually, but that collectively saved the defendants huge amounts of time and money."³¹

Trade Libel

The basis of Incyte's trade libel claim is that during discussions with BMS prior to the merger, Flexus presented properties of different compounds, including one made by Incyte. The data it presented on Incyte's compound was incorrect and was later included in materials presented to the BMS Board of Directors.

A trade libel claim exists where: "(1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity."³²

Defendants maintain that there is no evidence of recklessness of falsity, because the publication of the false Incyte data was a harmless mistake. According to Defendants, the mistake occurred when Jaen inferred that Incyte's confidential compound was a compound described in a public 2009 paper written by an Incyte

³¹ *Agilent Technologies, Inc. v. Kirkland*, 2010 WL 610725, at *24 (Del. Ch.).

³² *Incyte Corporation v. Flexus Biosciences, Inc.*, 2017 WL 7803923, at *7 (Del. Super.) (quoting *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 246 (Pa. 2002)).

scientist. Defendants assert that at least six medical vendors, the National Institute of Health, and multiple academic groups made the same erroneous assumption.

Even when viewing the facts in the light most favorable to Incyte, the evidence demonstrates that this was an honest mistake, not a statement made with reckless disregard for the truth. This is made especially clear by the fact that so many other entities in the business of determining the structures of compounds and making them commercially available—in other words, entities with a strong interest in publishing accurate facts and no discernible interest in defaming Incyte—made the same mistake as Flexus. The Court finds no genuine issue of material fact exists as to the validity of the trade libel claim.

Conspiracy

A civil conspiracy claim requires: “(1) A confederation or combination of two or more persons; (2) An unlawful act done in furtherance of the conspiracy; and (3) actual damage.”³³ The alleged unlawful act in this case is trade libel, which the Court has dismissed. Accordingly, the trade libel claim is dismissed as well.

³³ *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149–150 (Del. 1987).

CONCLUSION

Incyte's Second Motion to Amend is hereby **GRANTED**. Incyte has demonstrated good cause to amend its complaint to conform to the evidence revealed during discovery.

Incyte's Motion for Partial Summary Judgment and Defendants' Cross Motion for Summary Judgment are hereby **DENIED**. Genuine issues of material fact exist concerning the Jaen's knowledge of the Kohrt email and the whether the alleged trade secret contained in it—the half-life data—had any independent economic value.

Flexus's Motion for Summary Judgment is hereby **GRANTED IN PART AND DENIED IN PART**. The Court finds that the alleged clinical success and T-cell proliferation assay were not sufficiently confidential to be afforded protection under Delaware's Uniform Trade Secret Act. A genuine issue of material fact exists as to whether the human whole blood assay was a misappropriated trade secret, and whether the confidential actual half-life data possessed any independent economic value.

Dr. Rosen and Dr. Jaen's Motion for Summary Judgment is hereby **GRANTED IN PART AND DENIED IN PART**. The trade libel claim is dismissed because there is no evidence that Defendants acted with a reckless disregard for the truth. The conspiracy claim is dismissed because it was dependent

on the trade libel claim. Arguments regarding Defendants' individual knowledge of misappropriation are moot except for the half-life data secret, for which there exists a genuine issue of material fact as to whether the Kohrt email and White Paper demonstrate the requisite knowledge of misappropriation.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

INCYTE CORPORATION,)	
)	
Plaintiff,)	C.A. No. N15C-09-055 MMJ CCLD
)	
v.)	TRIAL BY JURY OF TWELVE
)	DEMANDED
FLEXUS BIOSCIENCES, INC.,)	
TERRY ROSEN, and JUAN JAEN,)	FILED UNDER SEAL
)	
Defendants.)	

Submitted: August 1, 2018

Decided: August 23, 2018

OPINION

Stephen L. Ascher, Esq. (argued), Jeremy H. Ershow, Esq., Jenner & Block LLP, David A. Schlier, Esq. (argued), Michael P. Kelly, Esq. (argued), Andrew S. Dupre, Esq., J. Wylie Donald, Esq., McCarter & English, LLP, Attorneys for Plaintiff Incyte Corporation.

Jonathan A. Patchen, Esq. (argued), Max B. Twine, Esq., Taylor & Patchen, LLP, Attorneys for Defendants Terry Rosen and Juan Jaen, James F. Hurst, Esq. (argued), Patricia A. Carson, Esq. (argued), Daniel Forchheimer, Kirkland & Ellis LLP, Attorneys for Defendant Flexus Biosciences, Inc., Gregory V. Varallo, Esq., C. Malcolm Cochran, IV, Esq., Travis S. Hunter, Esq., Katharine L. Mowery, Esq., Richards, Layton & Finger, P.A., Attorneys for Defendants.

JOHNSTON, J.

This is a trade secrets case. Defendants are Flexus Biosciences, Inc. and the two doctors, Terry Rosen and Juan Jaen, that founded Flexus. Plaintiff Incyte has alleged that Flexus was able to develop an IDO-1 inhibitor—a compound for cancer treatment—because of trade secrets misappropriated from Incyte. Incyte alleges that

the development of the inhibitor led to Flexus's \$1.25 billion merger with Bristol Myers Squibb ("BMS").

Incyte's original complaint contained claims for misappropriation of trade secrets, tortious interference with contract, unjust enrichment, conspiracy, and aiding and abetting. This Court dismissed the tortious interference with contract and aiding and abetting claims because of a lack of subject matter jurisdiction.¹ The Court later granted Incyte leave to amend the complaint to add a claim for trade libel.²

In sum, three Incyte claims remain pending in this case: misappropriation of trade secrets, trade libel, and conspiracy to commit trade libel.

Incyte alleges that four pieces of information constitute misappropriated trade secrets: (1) the half-life of its confidential IDO compound, (2) the knowledge of the "clinical success" of Incyte's IDO-inhibitor, and the knowledge that two tests, (3) a T-cell proliferation assay (TCPA), and (4) a whole human blood assay (HWBA), would accelerate the development of an IDO-inhibitor.

Incyte alleges that the source of the leak of three of the four trade secrets—the "clinical success," the TCPA, and the HWBA—was Dr. Jordan Fridman, a non-party to this case and a former Incyte employee and early Flexus employee.

¹ *Incyte Corp. v. Flexus Biosciences, Inc.*, 2016 WL 1735485, at *10 (Del. Super.).

² *Incyte Corp. v. Flexus Biosciences, Inc.*, 2017 WL 7803923, at *7 (Del. Super.).

Incyte claims Defendants misappropriated the fourth alleged trade secret, the half-life data, from two sources. First, they claim Defendants misappropriated a confidential Investigator's Brochure, which one defendant cited in a document (the "White Paper") sent to potential investors. Second, Incyte claims the half-life data was also provided by Dr. Holbrook Kohrt, a clinical investigator who had access to confidential Incyte data while he was employed by Flexus. They allege Kohrt sent the half-life data in an email to one of the defendants (the "Clinical Protocol Excerpt" or "CP Excerpt"). All of the allegations related to Kohrt are newly before the Court and are the sole basis of Incyte's second motion to amend the complaint.

The basis of the trade libel claim is a portion of a Flexus presentation to BMS. Defendants presented incorrect data related to a confidential Incyte compound. Incyte claims this misrepresentation led to an improper advancement of Flexus and a loss of opportunity for Incyte. It maintains Defendants acted in a conspiracy in furtherance of this trade libel.

Before the Court are five motions related to these claims.

Incyte has filed two of the five motions: a second motion to amend the complaint and a motion for partial summary judgment, both concerning the new Kohrt allegations.

Defendants have filed three motions for summary judgment. One was filed by Flexus and a second was filed jointly by defendants Drs. Rosen and Jaen.

Flexus's motion requests dismissal of Incyte's trade secret misappropriation claim, while the Drs.' motion primarily addresses Incyte's trade libel and conspiracy claims and also argues the Drs. are not liable with regard to the trade secret claim. All Defendants joined in a third motion for summary judgment. This third motion is a cross-motion filed in response to Incyte's motion for partial summary judgment.

SUMMARY JUDGMENT AND MOTION TO AMEND STANDARDS

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.³ All facts are viewed in a light most favorable to the non-moving party.⁴ Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.⁵ When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.⁶ If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.⁷

Like its first motion to amend its complaint, Incyte's second motion to amend

³ Super. Ct. Civ. R. 56(c).

⁴ *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).

⁵ Super. Ct. Civ. R. 56(c).

⁶ *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

must overcome two obstacles. First, because this Court issued a case management order that stated “[n]o amendment to the pleadings shall be permitted, except upon leave of Court on a showing of good cause,”⁸ Incyte must show good cause for the Court to permit the amendment. “[G]ood cause’ is likely to be found when the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party.”⁹

Second, the amendment must be permitted under Rule 15. Under that rule, “[a] party may amend its pleading after a responsive pleading is served by leave of the Court.”¹⁰ “[L]eave shall be freely given when justice so requires,” but “should be denied when the proposed amendment would be futile.”¹¹ “A motion for leave to amend a complaint is futile where the amended complaint would be subject to dismissal under Rule 12(b)(6) for failure to state a claim.”¹² “Motions to amend are normally granted by the Court unless there is serious prejudice to the opposing party.”¹³

⁸ *Incyte Corp. v. Flexus Biosciences, Inc.*, Del. Super., C.A. No. N15C-09-055, Johnston, J. (Nov. 17, 2016) (ORDER).

⁹ *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1107 (Del. 2006) (citation omitted).

¹⁰ Super. Ct. Civ. R. 15(a).

¹¹ *Id.*; *Clark v. State Farm Mutual Automobile Ins. Co.*, 131 A.3d 806, 811 (Del. 2016).

¹² *Clark*, 131 A.3d at 811–812.

¹³ *Harrison v. Hodgson Vocational Technical High School*, 2007 WL 3112479, at *1 (Del. Super.).

ANALYSIS

Incyte's Second Motion to Amend the Complaint

Incyte's original complaint alleged that various trade secrets were transmitted to Flexus by Dr. Jordan Fridman, a non-party to this case and a former Incyte employee. Incyte seeks to amend the complaint to add facts relating to a different non-party doctor, Holbrook Kohrt, who Incyte alleges also provided Flexus with trade secrets. Kohrt, now deceased, allegedly continued to participate in a research network of clinical investigators called the Cancer Immunotherapy Trials Network ("CITN") while he was an early Flexus employee. Incyte alleges that Kohrt did not disclose his employment with Flexus to the CITN, allowing him access to on-going clinical trials, which contained confidential information he forwarded to Flexus. Specifically, Incyte alleges Kohrt sent Dr. Jaen of Flexus an excerpt from a Clinical Protocol ("CP Excerpt") from one of Incyte's clinical trials that contained confidential information.

Incyte argues that the Court should grant its motion because it is only asking to amend the pleadings to conform to evidence revealed during discovery. Though the amended facts bring in a new source of misappropriation, they do not, according to Incyte, alter the nature of the claim it already has brought against Defendants.

Defendants claim to have produced the email Kohrt sent containing the CP Excerpt on January 21, 2017, early enough for Incyte to have included the allegations

in its August 25, 2017 first motion to amend. Moreover, Defendants state that Incyte became aware of the significance of the document on October 3, 2017 at the very latest, when Flexus's counsel explained in a hearing with the Special Master on a motion to compel the exact nature of the Kohrt email—that its text was a CP Excerpt. Nevertheless, Incyte did not bring the motion to amend until January 26, 2018, when the fact discovery cutoff date was January 29, 2017. Defendants also argue that allowing the amendment would cause them to suffer prejudice. Defendants specifically claim that if the motion were granted, they would need to take discovery regarding the nature of Kohrt's relationship with CITN and Incyte and the efforts taken to maintain confidential information arising from those relationships.

In defense of its delay, Incyte notes that though the email was in its possession for some time, it has a generic subject line and contains no indication of source. Incyte claims there was no actual evidence that the email was a CP Excerpt until Jaen testified to that effect on January 15, 2018. Incyte further argues that Defendants would suffer no prejudice because Defendants have been aware of the nature of the excerpt since at least the October 23, 2017 hearing. It also claims Defendants already have taken discovery on the topic.

The Court finds that Incyte has demonstrated good cause for the amendment and that granting it would not cause Defendants to suffer undue prejudice. The proposed amendment essentially conforms the pleadings to evidence found in

discovery. “It is particularly appropriate to amend pleadings so that they will conform to the evidence developed during discovery or at trial.”¹⁴ The complexity and breadth of this litigation, along with the innocuous initial appearance of the piece of evidence at issue, adequately explain why the significance of the email was not immediately apparent. The amendment is not so untimely as to seriously disrupt the planned timeline of the case. The Court remains hopeful that this decision will not delay trial.

Motions for Summary Judgment

Misappropriation of Trade Secrets

A trade secret is defined by Delaware’s Uniform Trade Secret Act as “information, including a formula, pattern, compilation, program, device, method, technique or process, that . . . [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”¹⁵ Misappropriation of a trade secret exists when there is “[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.”¹⁶

¹⁴ *Beattie v. Beattie*, 786 A.2d 549, 558 (Del. Super. 2001).

¹⁵ 6 Del. C. § 2001.

¹⁶ *Id.*

The Delaware Supreme Court recently has noted that to survive a motion for summary judgment, a misappropriation claim must be supported by specific evidence.¹⁷ While a “rational inference”¹⁸ may be made regarding misuse, such an inference may not be based “solely on speculation and conjecture.”¹⁹ Circumstantial evidence that the defendant had the “motive and opportunity” to misappropriate a secret—simply that it “could have” done it—or that the defendant’s subsequent product was “similar” to the plaintiff’s “is insufficient to give rise to an inference of misappropriation.”²⁰ At the summary judgment stage, “[i]t is no longer time for just smoke. There has to be some fire.”²¹

The Court will examine whether Incyte’s efforts to maintain confidentiality as a whole were sufficient before examining each trade secret in turn.

Reasonable Efforts

Defendants note that Fridman’s employment contract with Incyte did not include a covenant not to compete, that Incyte allowed Fridman to stay on for months at Incyte after he announced he would be taking a new job, and failed to remove Fridman from its IT network for a week after he left, at which time he continued to receive Incyte emails and had to ask to be removed from the system. After

¹⁷ *Elenza, Inc. v. Alcon Laboratories Holding Corp.*, 183 A.3d 717, 725 (Del. 2018).

¹⁸ *Id.* at 723.

¹⁹ *Id.* at 726.

²⁰ *Id.* at 725 (citing *Savor, Inc. v. FMR Corp.*, 2004 WL 1965869 (Del. Super.)).

²¹ *Id.* at 723.

Fridman's departure and after Incyte learned Fridman was working for a competitor on an IDO-inhibitor, Incyte did not seek assurances that confidential information would not be shared. Incyte only performed an internal investigation into Fridman's conduct after learning of the BMS merger.

In response, Incyte points to numerous measures it took to protect its trade secrets. It required every incoming employee to sign a confidentiality agreement, distributed an employee handbook with a section on disclosure of company information, held employee trainings regarding confidentiality, and held an exit interview in which the employee agreed to sign a certification of adherence to the confidentiality obligations. Incyte also points out that it was a California company when it hired Fridman and non-compete agreements are unenforceable in that state.

Viewing the facts in the light most favorable to Incyte, there is at least a genuine issue of material fact as to whether it took reasonable precautions to protect its trade secrets. Though Flexus has produced evidence suggesting it was possible for Incyte to take greater measures to maintain confidentiality, it remains a question of fact for the jury as to whether the efforts Incyte did take were "reasonable under the circumstances."

"Clinical Success"

The alleged "Clinical Success" trade secret concerns the supposedly improper disclosure of the promising results of a study on the efficacy of Incyte's IDO

compound. Incyte alleged that the disclosure of the study's positive results drove Flexus to pursue production of the same compound.

In addition to arguing that the clinical success had no economic value, Flexus argues this information was not confidential. Fridman's comments on the supposed clinical success of the compound came after Incyte publicly disclosed the same facts to investors. Incyte argues that this disclosure was inconsequential, because "the value of Fridman's comments was his personal corroboration of that information's import, as well as his personal testimonial of how his own opinion on IDO had evolved."²²

Incyte's argument implicitly concedes the "clinical success" information was no longer a trade secret. There is no genuine issue of material fact as to the publication of this information. No matter its value or source, Fridman's opinion on public information is not an actionable trade secret. The Court need not reach the parties' arguments as to the whether there was evidence of misappropriation.

T-Cell Proliferation Assay (TCPA)

An IDO inhibitor allows T-cells to proliferate. Performing a TCPA is a way to examine the effects of an IDO inhibitor. Incyte has alleged that Fridman disclosed the importance of TCPAs to Flexus, specifically that they could be used as "a gating criterion" and to resolve disconnects between other assays, which was valuable to

²² Incyte Br. 34.

avoid development delays.²³

Flexus argues that the value of TCPAs is not a trade secret as it has long been generally known to the public—Incyte itself published patents disclosing TCPA use in its IDO program.²⁴ It further notes that there is no evidence of a specific communication demonstrating misappropriation.

Incyte responds by stating that using a TCPA specifically as a “gating criterion” is a trade secret. “Gating means it’s a go/no-go kind of a decision based on the data you generate with that particular assay.”²⁵ Incyte also states that this specific use did not begin at Flexus until Fridman suggested it.

This alleged use of the TCPA was not sufficiently confidential to constitute a trade secret. It is undisputed that performing a TCPA to test an IDO is widely practiced. Incyte does not seek prevention of a proprietary, specific method of performing a TCPA, only the knowledge that performing this test at an early stage is valuable. The Court finds that this is not protectable as a trade secret, because it is “generally known” or at least “readily ascertainable” due to TCPA’s widespread use in IDO testing. The Court need not reach the parties’ arguments as to whether there is evidence that the TCPA was misappropriated.

²³ Incyte Opening Br. 29.

²⁴ Flexus Opening Br. 26.

²⁵ Incyte Answering Br. Ex. 62 at 194.

Human Whole Blood Assay (HWBA)

Performing an HWBA is another means of testing an IDO inhibitor's efficacy. Incyte alleges that Flexus specifically misappropriated the 100 ng/ml concentration Incyte used to perform the test, along with knowledge about whether characteristics and differences between human donors affected test results.

Flexus argues that Incyte can only allege Flexus had access to this information, not that it appropriated it. It points to an email establishing that Dr. Walters, not Fridman, suggested that Flexus perform a HWBA, that Walters took the lead on the project, that those working on the project reported to Walters and not Fridman, and to testimony from Walters that he had no discussions with Fridman about it. Most significantly, Flexus also argues that HWBA is not a trade secret, arguing that using a 100 ng/ml concentration in HWBA had previously been published.

In response, Incyte points to three pieces of circumstantial evidence: Flexus established its HWBA in 11 days, when it took Incyte 6–8 months; Flexus's HWBA concentration matched Incyte's; and Walters originally ordered tests with different concentrations before electing to use only the concentration by Incyte.²⁶

Circumstantial evidence appears to exist suggesting a misappropriation of using 100 ng/ml concentration in HWBA. Use of HWBA in this context existed in

²⁶ Incyte Br. 28.

the literature prior to Flexus's alleged misappropriation. However, it is a genuine issue of material fact whether the specific concentration used by Incyte was likewise previously published.²⁷ Incyte has established a *prima facie* case that Fridman directed the HWBA testing in accordance with the way it was performed at Incyte. The jury must determine whether that information was protected as a trade secret.

Confidentiality of the Half-Life Data

The half-life of a drug is the time it takes for an amount of a drug in a person's system to decrease by half. It is useful for determining an appropriate dose. Incyte alleges Flexus misappropriated the half-life of its molecule and used it in multiple presentations.

Flexus argues that Incyte disclosed the projected half-life of its molecule several times, making this a non-trade secret. Additionally, Flexus urges the Court to draw a distinction between the value of knowing the half-life to Incyte, which it does not deny, and the value to competitors of learning it, which it argues is non-existent. Flexus asserts that knowing the half-life would only be important to a competitor so that they would know how many daily doses the drug would need. Here, Incyte made no secret that its drug would require twice-daily dosing.

Incyte argues that the *actual*—not projected—half-life of its molecule

²⁷ See, e.g., Aff. of Ryan P. Durkin in Support of Defendants' Reply Briefs in Support of Their Motions for Summary Judgment Ex. 33 at Fig. 6.

remained confidential and a protected trade secret. The projections, which were not secret, placed the half-life at 4 to 7 hours, but the actual half-life was between 2.4 and 3.9 hours.²⁸ Incyte argues that Flexus used the confidential, actual data to differentiate its forthcoming drug from Incyte's.

The Court finds that there is a genuine issue of material fact as to whether the actual, non-projected half-life data—which indisputably remained confidential—was of independent economic value. A jury must determine the value, if any, of knowing the half-life was 2.4 to 3.9 hours rather than 4 to 7 hours. Neither party is entitled to summary judgment on this issue.

That this alleged trade secret remained confidential is not the end of the inquiry. Defendants also argue that there is no evidence of knowledge of misappropriation or recklessness on their part.

Incyte alleges that Flexus gained possession of a confidential brochure, which one of its founders, Dr. Jaen, cited in a White Paper in reference to the half-life of Incyte's molecule. Despite this citation, Flexus argues that Jaen never had the brochure—the source of the information was actually an excerpt of a different paper and the citation was incorrect. Incyte argues that the Court can reasonably infer that Flexus had possession of the brochure not only because of the citation, but also because a specific phrase in the White Paper was present in the brochure, but not the

²⁸ Incyte Answering Br. Ex. 58 at 4.

other alleged source.²⁹

The Court finds that although the physical brochure was not found in Flexus's possession, the circumstantial evidence is strong enough to at least create a genuine issue of material fact as to whether Defendants possessed it and acquired it with knowledge or a reason to have knowledge "that the trade secret was acquired by improper means."³⁰

Both sides also argue that each is entitled to summary judgment on the issue of misappropriation of the half-life data with the Kohrt email as the source. The Court finds neither is entitled to it. The jury must resolve the genuine issue of material fact of whether Jaen knew or should have known that Kohrt had sent him confidential information from a clinical trial in the email at issue.

Unjust Enrichment

Flexus argues that even if the above described trade secret misappropriation occurred, it was not enriched by any of it, because the proceeds of the merger with BMS went to Flexus's shareholders, not to Flexus. Incyte, meanwhile, has produced expert testimony as to the extent the acquisition of a trade secret in this case may have accelerated Flexus's marketability.

There is at least a genuine issue of material fact as to whether the alleged trade

²⁹ Incyte Answering Br. 31.

³⁰ 6 Del. C. § 2001.

secret misappropriation contributed to the BMS merger. Incyte's expert testimony creates a question for the jury as to whether the alleged trade secrets helped Defendants in "ways that might seem small individually, but that collectively saved the defendants huge amounts of time and money."³¹

Trade Libel

The basis of Incyte's trade libel claim is that during discussions with BMS prior to the merger, Flexus presented properties of different compounds, including one made by Incyte. The data it presented on Incyte's compound was incorrect and was later included in materials presented to the BMS Board of Directors.

A trade libel claim exists where: "(1) the statement is false; (2) the publisher either intends the publication to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; (3) pecuniary loss does in fact result; and (4) the publisher either knows that the statement is false or acts in reckless disregard of its truth or falsity."³²

Defendants maintain that there is no evidence of recklessness of falsity, because the publication of the false Incyte data was a harmless mistake. According to Defendants, the mistake occurred when Jaen inferred that Incyte's confidential compound was a compound described in a public 2009 paper written by an Incyte

³¹ *Agilent Technologies, Inc. v. Kirkland*, 2010 WL 610725, at *24 (Del. Ch.).

³² *Incyte Corporation v. Flexus Biosciences, Inc.*, 2017 WL 7803923, at *7 (Del. Super.) (quoting *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 809 A.2d 243, 246 (Pa. 2002)).

scientist. Defendants assert that at least six medical vendors, the National Institute of Health, and multiple academic groups made the same erroneous assumption.

Even when viewing the facts in the light most favorable to Incyte, the evidence demonstrates that this was an honest mistake, not a statement made with reckless disregard for the truth. This is made especially clear by the fact that so many other entities in the business of determining the structures of compounds and making them commercially available—in other words, entities with a strong interest in publishing accurate facts and no discernible interest in defaming Incyte—made the same mistake as Flexus. The Court finds no genuine issue of material fact exists as to the validity of the trade libel claim.

Conspiracy

A civil conspiracy claim requires: “(1) A confederation or combination of two or more persons; (2) An unlawful act done in furtherance of the conspiracy; and (3) actual damage.”³³ The alleged unlawful act in this case is trade libel, which the Court has dismissed. Accordingly, the trade libel claim is dismissed as well.

³³ *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149–150 (Del. 1987).

CONCLUSION

Incyte's Second Motion to Amend is hereby **GRANTED**. Incyte has demonstrated good cause to amend its complaint to conform to the evidence revealed during discovery.

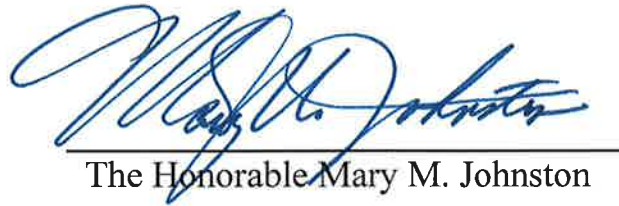
Incyte's Motion for Partial Summary Judgment and Defendants' Cross Motion for Summary Judgment are hereby **DENIED**. Genuine issues of material fact exist concerning the Jaen's knowledge of the Kohrt email and the whether the alleged trade secret contained in it—the half-life data—had any independent economic value.

Flexus's Motion for Summary Judgment is hereby **GRANTED IN PART AND DENIED IN PART**. The Court finds that the alleged clinical success and T-cell proliferation assay were not sufficiently confidential to be afforded protection under Delaware's Uniform Trade Secret Act. A genuine issue of material fact exists as to whether the human whole blood assay was a misappropriated trade secret, and whether the confidential actual half-life data possessed any independent economic value.

Dr. Rosen and Dr. Jaen's Motion for Summary Judgment is hereby **GRANTED IN PART AND DENIED IN PART**. The trade libel claim is dismissed because there is no evidence that Defendants acted with a reckless disregard for the truth. The conspiracy claim is dismissed because it was dependent

on the trade libel claim. Arguments regarding Defendants' individual knowledge of misappropriation are moot except for the half-life data secret, for which there exists a genuine issue of material fact as to whether the Kohrt email and White Paper demonstrate the requisite knowledge of misappropriation.

IT IS SO ORDERED.



The Honorable Mary M. Johnston